No. 396

In the Supreme Court of the United States

OCTOBER TERM, 1957

WILLIAM P. ROGERS, ATTORNEY GENERAL, PETITIONER

v.

JIMMIE QUAN, ALSO KNOWN AS QUAN DUNG NGOON, JOW MUN YOW AND JOW KWONG YEONG, YEN MOK, AND LAM WING

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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CITATIONS

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OPINION BELOW

The opinion of the Court of Appeals (R. 17) is reported at 248 F. 2d 89.

JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1957 (R. 22). The petition for a writ of certiorari was filed on August 23, 1957, and was granted on October 28, 1957 (R. 22). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether excluded aliens who have failed to establish their claims of right to enter the United States, and who have been admitted into the country only on

parole, are entitled to have applications for withholding of deportation entertained under Section 243 (h) of the Immigration and Nationality Act of 1952, on the ground that, if deported, they would be subject to physical persecution.

STATUTES INVOLVED

Section 243 (h) of the Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, 214, provides:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.

Section 237 (a) of the same Act provides in relevant part:

> (a) Any alien (other than an alien crewman) arriving in the United States who is excluded under this Act, shall be immediately deported to the country whence he came, in accommodations of the same class in which he arrived, on the vessel or aircraft bringing him, unless the Attorney General, in an individual case, in his discretion, concludes that immediate deportation is not practicable or proper. * * *

Section 212 (d) of the same Act provides in relevant part:

* * * * *

> (5) The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe

> for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.
>
> * * * * *

Section 18 of the Immigration Act of 1917, 39 Stat. 887, as amended, 8 U. S. C. (1946 ed.) 154, provides in relevant part:

> All aliens brought to this country in violation of law shall be immediately sent back, in accommodations of the same class in which they arrived, to the country whence they respectively came, on the vessels bringing them, unless in the opinion of the Attorney General, immediate deportation is not practicable or proper. * * *

STATEMENT

The five respondents, natives and citizens of China ordered excluded from this country, sought to have the United States District Court for the District of Columbia direct the Attorney General to consider their claims, made under Section 243 (h) of the Immigration and Nationality Act of 1952, that they would be subject to physical persecution if deported to Communist China. The District Court dismissed

the complaints,[1] and the Court of Appeals, hearing a consolidated appeal, reversed.

The complaints alleged that respondents were paroled into this country. Jimmie Quan, alias Quan Dung Ngoon, last arrived on July 13, 1949, claiming American citizenship, was paroled thereafter, and was ordered excluded on December 3, 1954 (R. 2). Jow Mun Yow and Jow Kwong Yeong arrived on October 21, 1951, likewise claiming American citizenship. They were paroled on July 22, 1952, and ordered excluded on August 14, 1953 (R. 5). Yen Mok arrived in December of 1954. He was paroled thereafter and ordered excluded on May 23, 1955 (R. 9). Lam Wing, who arrived originally as a seaman in 1943, last arrived on April 17, 1952, was ordered excluded, and was then paroled into the United States (R. 12).

The complaints further alleged that respondents were threatened with deportation to Communist China through Hong Kong;[2] that they filed applications under Section 243 (h) of the Immigration and Nationality Act of 1952 for a stay, on the ground that such deportation would subject them to physical persecution; and that the Attorney General advised them that their applications could not be considered because Section 243 (h) was inapplicable to exclusion cases (R. 2, 5–6, 9, 12–13). The complaint of Quan also alleged a denial by the Attorney General of his request for continued parole under Section 212 (d) (5) of the

[1] The complaints totaled four in number, two of the complainants having filed jointly.

[2] Respondents were ordered excluded and deported to the place from whence them came—Hong Kong.

1952 Act (R. 2). All of the respondents asserted that the refusal to consider their applications was arbitrary and contrary to law. They asked for declaratory judgments that they were not deportable to Communist China, that the Attorney General be restrained from deporting them there, and that he be directed to consider their applications for a stay under Section 243 (h) (R. 3, 7, 10, 13).

The District Court dismissed the complaints for lack of jurisdiction[3] and for failure to state claims upon which relief might be granted (R. 4, 8, 11, 16). The Court of Appeals, in reversing, held that the Attorney General has the power, under Section 243 (h) of the Act, to withhold the deportation of an alien on the ground of physical persecution, whether such alien was in the country by legal entry or merely on parole (R. 17–20).

After the grant of certiorari by this Court, the cause was held in abeyance to enable the respondents to seek further administrative relief in the form of current requests for continued parole under Section 212 (d) (5) of the 1952 Act, since it had been concluded that the Attorney General has power to grant continued parole to an excluded alien "for emergent reasons or for reasons deemed strictly in the public interest" and that a claim of danger of physical persecution was a relevant factor to be considered in ap-

[3] This ruling was made before the decision of this Court in *Brownell v. Tom We Shung*, 352 U. S. 180, holding that an exclusion order may be reviewed in a declaratory judgment action.

plying that standard.[4] Respondents requested further parole in January and February of 1958. On February 12th and 13th, 1958, after a consideration of the requests, including the allegations as to physical persecution, it was decided that parole would not be continued.[5]

ARGUMENT

We have briefed, in the companion case of *Leng May Ma* v. *Barber*, No. 105, the issue of the applicability of Section 243 (h) of the Immigration and Nationality Act of 1952 to excluded aliens who have been admitted into this country only on parole. In that brief, we urge that the context and legislative history of Section 243 (h) demonstrate that this Section encompasses only the grant of relief to aliens legally in the country who are ordered *expelled;* that an *excluded* alien cannot be regarded as an "alien within the United States" in the meaning of Section 243 (h); and that neither detention in custody nor enlargement on parole constitutes an admission into the United States or otherwise changes the legal status of an excluded alien. This line of argument is fully applicable to the instant case and is incorporated by reference.

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[4] Briefing of the case in this Court was suspended pursuant to the Court's grant of the Solicitor General's motion, in which counsel for respondents acquiesced. This motion was the same as the one filed in the companion *Leng May Ma* case, No. 105. See respondent's brief in No. 105, p. 5.

[5] The denials were by the District Director, Immigration and Naturalization Service, San Francisco District (requests of Jimmie Quan, Jow Mun Yow and Jow Kwong Yeong) and by the District Director of the New York District (requests of Yen Mok and Lam Wing).

In this case, it should be noted further that the complaint of Jimmie Quan, filed in the District Court, alleged the denial of a request for continued parole under Section 212 (d) (5) of the 1952 Act (R. 2). The matter of continued parole, however, was not the issue decided by the Court of Appeals and was not brought to this Court on the government's petition for a writ of certiorari. Insofar as the record suggested the possibility of error in declining to consider Quan's original request under 212 (d) (5), that error has been cured by the subsequent consideration of his later request for such relief.

As set forth in our brief in No. 105, we believe that a request for parole under Section 212 (d) (5) (which all respondents here have recently, but unsuccessfully, sought) is a matter exclusively within the jurisdiction of the executive branch of the Government.[6] In all events, in the present posture of this case and of No. 105, the only issue before the Court is the applicability of Section 243 (h) to excluded aliens.

[6] As in the case of petitioner in No. 105, we are advised by the Immigration and Naturalization Service that the recent requests for continued parole under Section 212 (d) (5) were denied because, among other reasons, the respondents failed to establish, in the Service's view, that they would be subject to physical persecution if removed to Communist China.

CONCLUSION

For the reasons set forth in the Government's brief in *Leng May Ma* v. *Barber*, No. 105, this Term, it is respectfully submitted that the judgment of the court below should be reversed.

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